Abdul Manaf Mohd bin Ghows & Ors v Nusantara Timur Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO S6-22-112-90
ANUAR J
27 JANUARY 1994

Civil Procedure *— Summary judgment — Appeal against decision of senior assistant registrar dismissing O 14 application — Appeal allowed by judge-in-chambers — Defendants applied to present further arguments against O 14 application — Delay in application for summary judgment — No explanation given — Rules of the High Court 1980 O 14*

Civil Procedure *— Summary judgment — Appeal against decision of senior assistant registrar dismissing O 14 application — Whether triable issues raised — Not to be tried on affidavit evidence — Rules of the High Court 1980 O 14*

The plaintiffs' claim against the defendants was for RM850,000 being the unpaid balance purchase price of shares which the plaintiffs had sold to the first defendant. The defendants entered appearance on 28 March 1990 and filed their defence on 17 April 1990. The plaintiffs applied for summary judgment under O 14 of the Rules of the High Court 1980 on 19 June 1990 but their application was dismissed by the senior assistant registrar. The plaintiffs' appeal to the judge-in-chambers was allowed but the second and third defendants applied to present further arguments in open court against the plaintiffs' application. The judge allowed the defendants' application and fixed a date for hearing further arguments. However, the plaintiffs applied for an adjournment of the hearing on the ground that they had filed an appeal against the judge's decision to enlarge time to enable the defendants to apply for further arguments. The adjournment was refused and the court proceeded to hear further arguments on the date fixed although the plaintiffs and their counsel did not turn up.

Held, dismissing the appeal and setting aside the earlier order allowing the appeal:

(1) The application for summary judgment was made long after the filing of the defence. There was no explanation for the delay of some two months after the delivery of defence and the court was constrained to hold that summary judgment should not be entered.

(2) There were triable issues requiring judicial interpretation and involving questions of fact which could only be determined at the trial where the judge has the advantage of seeing and hearing the witnesses and assessing their evidence and credibility. As such, the court was unable to to resolve the case on conflicting affidavit evidence alone and the appeal would accordingly be dismissed.

A [**Bahasa Malaysia summary**

Tuntutan plaintif terhadap defendan adalah untuk jumlah RM850,000 iaitu baki harga belian yang masih belum dibayar untuk saham yang dijual oleh plaintif kepada defendan pertama. Defendan telah memasuki kehadiran pada 28 Mac 1990 dan memfailkan pembelaan mereka
B pada 17 April 1990. Plaintif telah memohon untuk penghakiman terus di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 pada 19 June 1990 tetapi permohonan mereka telah ditolak oleh penolong kanan pendaftar. Rayuan plaintif kepada hakim dalam kamar telah dibenarkan tetapi responden kedua dan ketiga telah memohon supaya dibenarkan mengemukakan hujah-hujah lanjut di mahkamah terbuka
C terhadap permohonan plaintif. Hakim telah membenarkan permohonan defendan dan menetapkan suatu tarikh untuk mendengar hujah-hujah lanjut. Bagaimanapun, plaintif telah memohon untuk suatu penangguhan pendengaran itu atas alasan bahawa mereka telah memfailkan suatu rayuan terhadap keputusan hakim untuk melanjutkan
D masa supaya membolehkan defendan membuat permohonan untuk membuat hujah-hujah lanjut. Penangguhan itu tidak dibenarkan and mahkamah terus mendengar hujah-hujah lanjut pada tarikh yang telah ditetapkan walaupun plaintif dan peguambela mereka tidak hadir.

E **Diputuskan,** menolak rayuan itu dan mengetepikan perintah terdahulu yang membenarkan rayuan itu:

(1) Permohonan untuk penghakiman terus telah dibuat lama selepas pembelaan difailkan. Tidak ada penjelasan mengenai kelengahan selama dua bulan selepas pembelaan dihantarkan dan mahkamah terpaksa memutuskan bahawa penghakiman terus tidak seharusnya
F dimasukkan.

(2) Terdapat isu yang harus dibicarakan yang memerlukan pentafsiran penghakiman dan melibatkan soalan fakta yang hanya boleh diselesaikan pada perbicaraan di mana hakim mempunyai kelebihan melihat dan mendengar saksi-saksi dan mentaksirkan
G keterangan dan kebolehpercayaan mereka. Oleh itu, mahkamah tidak berkeupayaan menyelesaikan kes ini semata-matanya berdasarkan atas keterangan afidavit yang bercanggah dan dengan demikian, rayuan ini ditolak.]

Notes

H For cases on delay in applying for summary judgment, see 2 *Mallal's Digest* (4th Ed) paras 2218–2219; [1989] Mallal's Digest 541; [1991] Mallal's Digest 452–454, 461–465; [1992] Mallal's Digest 375.

For cases on triable issues, see 2 *Mallal's Digest* (4th Ed) paras 2287–
I 2296; [1989] Mallal's Digest 505–559; [1990] Mallal's Digest 404–436; [1991] Mallal's Digest 448–450, 456, 482–496; [1992] Mallal's Digest 384–386.

Cases referred to

1 *Krishnamurthy & Anor v Malayan Finance Corp Bhd* [1986] 2 MLJ 134 (folld)
2 *Jagatheesan v Linggi Plantations Ltd* [1969] 2 MLJ 253 (refd)
3 *New Straits Times (M) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 MLJ 226 (refd)
4 *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300 (refd)

Kadir Kassim (*CS Saini & Associates*) for the plaintiffs.
Wong Kim Fatt (*L Nagarajan* with him) (*Gulam & Wong*) for the second and third defendants.

Anuar J: The 14 plaintiffs herein filed this suit against the three defendants on or about 8 March 1990. All the plaintiffs are natural persons except the 10th, 11th and 14th plaintiffs which are private limited companies incorporated in Malaysia. The first defendant is also a company incorporated in Malaysia.

The second and third defendants were at all material times the directors and shareholders of the first defendant company. According to paras 16 and 17 of the statement of claim, by an agreement entered into on 3 November 1986 between the first to tenth plaintiffs of the one part and the first defendant company of the other part, these ten plaintiffs agreed to sell their individual shares in a company known as Seri Naga Construction Sdn Bhd on the terms and condition stated in the agreement, for a total consideration of RM1m, which was payable by the first defendant. The second and third defendants were not parties to the agreement. It was not in dispute that the first defendant had paid the sum of RM150,000 pursuant to the agreement. The balance of RM850,000 however, was not admitted by the defendants to be owing, though demanded by the plaintiffs. It is alleged in paras 20, 24, 25 and 28 of the statement of claim as follows:

> 20 In breach of the above terms and conditions of the said agreement the first defendants have failed to pay to the first to tenth plaintiffs the balance sum of Ringgit Eight Hundred and Fifty Thousand (RM850,000) or any part thereof.
> 24 The 12th, 13th and 14th plaintiffs executed guarantees in favour of KUBB to guarantee the repayment of the loan by the 11th plaintiff to KUBB.
> 25 By an agreement evidenced by various letters exchanged and meetings between the 12th plaintiff for and on behalf of himself and the 13th and 14th plaintiffs, the defendants and KUBB, the defendants agreed and undertook to pay the balance purchase price directly to KUBB to redeem the said land and discharge the 12th, 13th and 14th plaintiffs from their liability under the guarantees in favour of KUBB.
> 28 In breach of the agreement referred to in para 24 above and despite various requests and demands, the defendants have omitted, neglected, failed and/or refused to assume the liability of the 11th plaintiff and discharge the guarantees executed by the 12th, 13th and 14th plaintiffs.

The plaintiffs claim judgment for RM850,000 with interest and damages, with also two alternative claims and costs against the defendants.

The three defendants entered appearance to the writ on 28 March 1990 through their solicitors, who filed the defence on 17 April 1990 resisting the claims. Paragraphs 5, 6 and 7, of the defence refer to the agreement of 3 November 1986, and para 11 refers to another agreement dated 31 October 1988. These four paragraphs read as follows:

> 5 The defendants make no admission as to para 20 of the statement of claim. The defendants contend that it was an express term of cl 8.1 of the said agreement that in the event the purchaser shall for any reason whatsoever fail or refuse to complete the sale and purchase of the said shares therein the vendors shall be entitled to forfeit the said deposit of RM150,000 paid under sub-cl 2.2.1 and forthwith the agreement shall be rendered as null and void and be of no further force or effect.
>
> 6 The defendants will refer to the said agreement at the trial of this action for its full term and effects.
>
> 7 The defendants aver that in view of cl 8.1 of the said agreement the plaintiffs' claim herein has been extinguished.
>
> 11 By a sale and purchase agreement dated 31 October 1988 entered into between the first defendant and Sutra Development Sdn Bhd with the knowledge and consent of the 12th plaintiff the said Sutra Development Sdn Bhd agreed to take over and accepted liabilities of the loan granted by KUBB together with accrued interest to the 11th plaintiff. Further, the said Sutra Development Sdn Bhd assumed liabilities of [the] 12th, 13th, and 14th plaintiffs as the directors and guarantors of the 11th plaintiff for the said loan. The defendants will refer to the said contract at the trial of this action for its full terms and effect.

The plaintiffs filed their undated reply joining issue with the defendants in their defence. The expression 'joining issues' suggests to me that there is an issue of fact or law the determination of which has either an important or decisive bearing on the outcome of the case.

Application for summary judgment

The plaintiffs applied for summary judgment by summons-in-chambers dated 19 June 1990. Three affidavits of the 12th plaintiff (Mohd Ali Dewal) were filed in support thereof, while one affidavit by the third defendant and another by the second defendant were filed on behalf of the three defendants, opposing the plaintiffs' application. The senior assistant registrar dismissed the plaintiffs' application. The plaintiffs then filed appeal to the judge-in-chambers (encl 23) and on 23 July 1992, I allowed the plaintiffs' appeal and entered judgment in favour of the plaintiffs for RM850,000 with interest and costs, and damages to be assessed. Subsequently, I allowed the second and third defendants' application for further argument on the plaintiffs' appeal (which is the present subject matter) which was fixed for hearing at 9 am on 20 May 1993, a date suitable to counsel for both sides. (The first defendant had not applied for further argument).

However, by letter dated 17 May 1993, ie three days before the hearing of further argument, the solicitors for the plaintiffs applied for adjournment of the hearing on the ground that they had filed a notice of appeal against my decision of 20 April 1993, in the exercise of my discretion, to enlarge time to enable the second and third defendants to apply for further argument

in open court on the plaintiffs' appeal. The second and third defendants' solicitors promptly objected by letter of the same date to the adjournment. The court refused to grant the plaintiffs' application for adjournment and I had expected counsel for both sides to be punctual and present in court on the date as fixed. However, neither the plaintiffs' counsel nor their solicitor was present in court when the hearing of further argument in open court on the plaintiffs' appeal (encl 23) was called up for hearing on 20 May 1993 at 10.15 am. I decided to proceed to hear Mr Wong Kim Fatt, new counsel for the second and third defendants in the absence of the plaintiffs and their counsel. After reading Mr Wong Kim Fatt's written outline of submissions and hearing his oral submission in open court, I had no difficulty in deciding to set aside my order of 23 July 1992 and dismissing the plaintiffs' appeal with costs. My reasons are as follows.

Reasons for dismissal

Mr Wong brought to my attention the indisputable fact that the application for summary judgment dated 19 June 1990 was made long after the filing of the defence on 17 April 1990. He cited the Supreme Court case of *Krishnamurthy & Anor v Malayan Finance Corp Bhd*,[1] in which the court said at p 135:

> In the second place the law as to the time when an application for an O 14 judgment could be made is settled law. The application must be made after an appearance has been entered and it could be made either before or after the delivery of defence provided that where it was made after the delivery of the defence, the plaintiff must explain the delay. If this explanation was not accepted by the court no O 14 judgment could be signed.

Now, with hindsight and on re-reading carefully the affidavits filed on behalf of the plaintiffs in support of their application for summary judgment under O 14 of the Rules of the High Court 1980, I have not been able to find any explanation for the delay of some two months in making the application. As the appearance was entered on 28 March 1990, the application should have been made shortly after that. Since the plaintiffs did not explain in their affidavits the delay in making their application after the delivery of defence, I am, guided by the *Krishnamurthy*'s case,[2] constrained to hold that summary judgment should not be entered.

Mr Wong further contended that there are triable issues which can only be resolved at the trial. In this connection, I have read and considered carefully the statement of claim, the defence and the plaintiffs' reply.

First, I note at para 6(a) of the plaintiffs' reply that they say that they 'will refer to and rely on the letter dated 19 March 1987 for its full terms and effects at the trial of this matter'. This letter (marked exh AD3 of the 12th plaintiff) was from Kewangan Usaha Bersatu Bhd ('KUBB') to Seri Naga Construction Sdn Bhd offering the latter a term loan of RM850,000 on terms and conditions. It appears from the plaintiffs' own reply that the terms and effects of this letter will require judicial interpretation at the trial. It is a triable issue. In the event summary judgment cannot be granted.

Secondly, the plaintiffs appear to base their claim on the defendants' alleged breach of the agreement dated 3 November 1986 which was entered into between the first to the tenth defendants and the first defendant company. The second and third defendants have raised the issue in paras 5 and 7 of their defence that the plaintiffs' claim is extinguished, on default or non-completion by the first defendant, by the forfeiture of the deposit of RM150,000 by the plaintiffs under the provisions of the cl 8.1 of that agreement which reads as follows:

> The parties hereto hereby agree that in the event the purchaser shall for any reason whatsoever fail or refuse to complete the sale and purchase of the said shares herein the vendors shall be entitled to forfeit the said deposit of RM150,000 paid under sub-clause 2.2.1 and forthwith this agreement shall be rendered null and void and be of no further force or effect.

The plaintiffs contend otherwise in para 4 of their reply, which reads as follows:

> The defendants' averments in para 7 of the defence are incorrect and untrue. The plaintiffs deny that their claim is extinguished by reason of cl 8.1 of the agreement dated 3 November 1986.

Whether the forfeiture by the plaintiffs of the deposit of RM150,000 extinguishes their claim or is sufficient compensation to them or not may involve the application of s 75 of the Contracts Act 1950 in the light of evidence adduced at the trial. To my mind, this is a material question of interpretation based on a finding of facts, at the trial, of the intention of the parties. It may call for a close and careful consideration of the Federal Court case of *Jagatheesan v Linggi Plantations Ltd.*[2]

Thirdly, in para 25 of the statement of claim, it is stated that the defendants agreed and undertook to pay the balance of the purchase price. The plaintiffs did not specify which defendant had agreed and given the undertaking to make the payment. The second and third defendants deny the plaintiffs' allegations. This surely is a question of fact which can only be determined at the trial after hearing witnesses and assessing their credibility, and not on conflicting affidavit evidence. In para 28 of the statement of claim, the plaintiffs allege that the defendants refused to assume the liability. The defendants, however, put them to strict proof. In para 17 of the statement of claim, it was the first defendant alone that was alleged to be liable for payment of the consideration of RM1m. Under para 11 of the statement of defence which I have referred to above, it is alleged that, under the sale and purchase agreement dated 31 October 1988 entered into between the first defendant and Sutra Development Sdn Bhd, Sutra Development Sdn Bhd had agreed to take over the liabilities. The second and third defendants were not parties to this agreement. In this connection, it may well be necessary to consider at the trial the terms and effects of this agreement of 31 October 1988 (exh AD 11 to the affidavit of the 12th plaintiff dated 8 March 1991). Clause 4 thereof reads as follows:

Assumption of liabilities

4.1 The purchaser [ie Sutra Development Sdn Bhd] shall assume and takeover the loan granted by KUBB together with accrued interest to Madon Sdn Bhd [the 11th plaintiff] which at 31 August 1988 stands as follows:

Principal amount	RM850,000
Outstanding interest	RM210,000

4.2 The purchaser hereby further agrees covenants and undertakes with the vendors that after the date of this agreement all directors nominated and appointed by the purchaser shall assume the liabilities of the directors as guarantors for the loan referred to in cl 4.1 hereinbefore and the purchaser shall cause such newly nominated and appointed directors of the company to execute guarantee agreement in such form as may be approved by KUBB.

Paragraph 32 of the statement of claim contains the prayers in which the plaintiffs are making various claims, with two alternatives, including the equitable remedy of specific performance and damages. These claims are denied by the defendants. I am of the opinion that the various issues raised in the defence and reply and highlighted in the affidavits can only be determined at the trial. They are triable issues which are best resolved at the trial itself where the trial judge has the advantage of seeing and hearing the witnesses for the parties and assessing their evidence and credibility. (See *New Straits Times (M) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor*[3] and *National Company for Foreign Trade v Kayu Raya Sdn Bhd.*[4])

On reading and considering the pleadings and the affidavits filed for both sides, I am unable to resolve the issues on the conflicting affidavit evidence before me. It is therefore obvious that I cannot decide the case on affidavit evidence alone.

Accordingly, under O 56 r 2(2), I set aside my order of 23 July 1992 and dismissed the plaintiffs' appeal. I affirmed the order of the senior assistant registrar who dismissed the plaintiffs' application for summary judgment. The plaintiffs are to pay the costs of the hearing before me and the senior assistant registrar. I would like to make it clear that, at this interlocutory stage of the proceedings, I have not formed, and ought not to form, any opinion on the merit or final outcome of the case of either party, as this can only be decided at the end of the trial.

Appeal dismissed.

Reported by Anne Khoo